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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1944

LEE F. WEILER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion in the Circuit Court of Appeals of Circuit Judge Maris (R. 190–200), the concurring opinion of District Judge Bard (R. 200–201), and the dissenting opinion of Circuit Judge Jones (R. 201–204) are reported in 143 F. (2d) 204.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 31, 1944 (R. 204), and a petition for rehearing (R. 205–219) was denied on July 10, 1944 (R. 225). The petition for a writ of certiorari, filed on August 12, 1944, was, with

the limitation hereinafter indicated, granted on October 9, 1944 (R. 226). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The order allowing certiorari limits review to the question "stated as Question 1 in the respondent's brief" (R. 226), to wit:

> "Whether, in a prosecution for perjury, the trial court committed reversible error in refusing to charge, as requested by petitioner, that the Government must establish the falsity of petitioner's statement by the testimony of two independent witnesses or one witness and corroborating circumstances."

STATUTE INVOLVED

The Federal perjury statute (Section 125 of the Criminal Code; 18 U. S. C. 231) provides:

> Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or

subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

An indictment for perjury was returned against the petitioner in the United States District Court for the Eastern District of Pennsylvania charging that, in a recent criminal proceeding against him and one other, the petitioner had willfully testified falsely under oath to certain material matters (R. 3a–11a). In the earlier case, which resulted in acquittal, the petitioner had been charged, among other things, with making prohibited sales of rubber tires and tubes under false invoices and with willful failure to file an inventory of tires and tubes on or before December 31, 1941, as required by the Office of Production Management and the Office of Price Administration (R. 74a, 105a–111a). The perjury indictment sets forth testimony of the petitioner at the trial of the earlier case, that he had not filed an inventory of tires for the first three months of 1942[1] because he had had no tires at that time; and that although he had signed a notarized letter, dated March 24, 1942, referring to himself as having

[1] The materiality of this testimony in an inquiry about the petitioner's failure to file in 1941 is explained in Judge Maris' opinion below (R. 192). This question is outside the scope of review specified in the order allowing certiorari.

purchased 170 tires on March 16, 1942, he had merely financed the purchase of these tires for someone else (R. 4a–10a). The indictment alleges that the petitioner gave this and related testimony knowing it to be false (R. 10a).

At the trial in this case, the petitioner's testimony at the earlier trial relating to his failure to file an inventory in 1942 was introduced in evidence. This included an admission that he had signed the letter of March 24, 1942 (R. 126a–127a); a denial that he had ever received the tires (R. 127a); an assertion that he had acted merely as a financier and go-between, the real parties in interest being a tire dealer named Roatche and one Sweeney, manager of the corporation which had offered the tires for sale (R. 131a); and a profession of complete ignorance of a letter signed "Bob Hastings" purporting to order the tires for the petitioner's concern. Testifying in his own behalf, the petitioner gave substantially the same evidence (R. 73a–91a), although there are new discrepancies in his statement of the amount of money which he claimed to have loaned (R. 77a, 83a, 85a, 89a) and in his reference at one point to Roatche and Sweeney (R. 76a–77a) and at another to Roatche alone as the borrower (R. 77a, 86a–89a).

Sweeney testified that in March, 1942, United States Petroleum Corporation was liquidating its tire department, of which he was manager; that it was to the financial advantage of the company

to sell the tires rather than to return them to the manufacurer; that he had persuaded the petitioner, who was authorized to buy the tires in question, to buy them; that he and the petitioner had agreed upon the price; that the petitioner had given him a written order, dated March 16, 1942, for the tires (R. 41a–43a, 49a–50a, Govt. Ex. 3, R. 54a, 58a, 147a); and that the petitioner had stated that he would send his truck for the tires (R. 47a). Sweeney testified further that Evans, manager of the petitioner's garage (R. 80a), called for the tires in the truck which had previously been used by the petitioner's employees, loaded the tires on the truck, and paid for them in cash (R. 43a, 47a, 48a), receiving in return a receipted bill showing the sale of the tires to the petitioner's concern for a total price of $1,248.73 (R. 43a–44a, Govt. Ex. 5, R. 37a, 148a). Sweeney categorically stated that he had not purchased the tires or invested any money in them; that he had not received the tires; that he had made no private arrangement with the petitioner in respect of the tires; and that he had had no interest in the transaction other than his official one as manager of the tire department (R. 44a–45a, 50a–51a).

Roatche testified that Sweeney had informed him of the proposed liquidation of the corporation's tire department and asked him whether he knew of "a legal outlet" for the tires; that Roatche had thereupon suggested the petitioner; that

Sweeney and Roatche had visited the petitioner who had agreed to buy the tires from Sweeney's corporation; that subsequently Roatche had ridden with the petitioner's manager, Evans, when Evans called for the tires; and that Roatche had been present when Evans received the tires, had helped him load them on the truck, had driven back to Philadelphia with Evans, but had alighted at his own place of business before the tires were delivered (R. 60a–62a, 64a). Roatche testified that he had not purchased the tires (R. 59a, 61a); that he had received no loan from the petitioner for their purchase (R. 60a–61a); and that the tires had not been delivered to him (R. 60a, 64a). He also professed ignorance of the "Bob Hastings" letter (R. 62a; see also R. 65a).

Gabel, president of United States Petroleum Corporation (R. 26a), testified that, upon learning of the sale of tires to the petitioner, he had sent for the petitioner and asked him for a letter to the effect that the petitioner "was competent under the Act to buy those tires" (R. 27a–28a, 30a, 31a). Gabel sent a notary to the petitioner's office to obtain such a letter (R. 28a). Oates, office manager of United States Petroleum Corporation, a notary public, testified that he had witnessed the petitioner affix his signature to the letter of March 24, and had then affixed his signature and seal as a notary (R. 33a–35a, Govt. Ex. 4, R. 147a–148a).

In submitting the case to the jury, the District Judge, after reviewing the contentions of the Government and of the petitioner, stated (R. 98a–99a):

> * * * He [the petitioner] says that it was a transaction in which he was not the real party becoming the purchaser of the tires, but that they were purchased through an arrangement in which he loaned the money. If you find, of course, that that was the condition governing this transaction it would seem that the defendant did not testify falsely on his first trial.
>
> On the other hand if you find that the Government's contention is true, that he did purchase the tires, and it was his transaction, then it would naturally follow that the defendant testified falsely on the trial in March, 1943.

Among other instructions to the jury, the petitioner requested the following (R. 103a):

> The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty.

The judge's charge included instructions on the presumption of innocence, the necessity of finding the defendant guilty beyond a reasonable doubt, and the jury's right to determine the credibility of the witnesses, including the defendant

(R. 99a–100a); but it did not include the petitioner's requested instruction as to the quantum of evidence (R. 100a–101a).

The jury returned a verdict of guilty (R. 104a), and the petitioner was sentenced to imprisonment for a term of a year and a day (R. 167a). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed, one judge dissenting (R. 190, 200, 201, 204). In the opinion of the Court, Judge Maris expressed the view that the rule that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances is a rule of law to be applied by the judge in determining whether the case should be submitted to the jury and, hence, not a proper subject for an instruction to the jury. The Government's evidence, in his opinion, met the quantitative test (R. 190–200). Judge Bard's concurring opinion expressed the view that the decision of this Court in *Goins* v. *United States*, 305 U. S. 622, establishes "that after the required quantum of evidence has been submitted to the jury, it is the function of the jury to determine the guilt or innocence upon all the evidence, and a defendant so convicted has no ground for reversal" (R. 200–201). Judge Jones, dissenting, thought that the requested instruction on quantum of evidence should have been given to the jury, and that failure to give it was prejudicial error because the evidentiary situation here differed materially from that in the *Goins* case (R. 201–204).

SUMMARY OF ARGUMENT

I

Assuming that the defendant in a perjury case is ordinarily entitled to have the jury instructed that the falsity of his oath must be proved by two witnesses or one witness and corroborating circumstances, we think that here in accordance with this Court's decision in *Goins* v. *United States*, 306 U. S. 622, the petitioner's conviction should be sustained on the ground that failure to give such instruction could not have been prejudicial. The issue which the jury determined under the judge's charge was whether the petitioner was the real purchaser of certain tires or whether he was merely an accommodation party. It is inconceivable that the jury could have accepted the testimony of either of the principal witnesses, Sweeney and Roatche, without accepting that of the other; or that with such acceptance, it could have rejected the corroborative evidence supplied by the letter of March 24, 1942, in which the petitioner acknowledged purchasing the tires. On the record, there is no possibility that the jury credited a smaller aggregate of evidence than would have been called for by the requested charge.

II

We renew here the contention made by the Government in the *Goins* case that the rule requiring a special quantum of evidence to convict of perjury should be rejected. The origin and development of the perjury rule, in an environment ir-

relevant to the conditions of modern criminal administration, lead us to question its continuing claim to contemporary application. Judicial decisions show that the continuous and, we submit, ineffectual attempts to refashion the rule to meet current needs have resulted only in confusion and uncertainty with respect to the rule's scope.

On examining the only justifications offered in support of the rule's present vitality, we find none of them persuasive. The principle of "oath against oath" is pure anachronism, and it is enough to point to the crime of murder to establish that justifications in terms of the greater enormity of perjury are unpersuasive. The more plausible argument that the perjury rule serves a useful function in encouraging witnesses to testify by reducing the fear of unfounded perjury prosecutions also appears spurious on close examination. On balance, it is heavily outweighed by a more fundamental objective of the law: to encourage witnesses to testify to the truth.

Of this Court's authority to abrogate the perjury rule, we believe there is no serious doubt. The issue is clearly within the realm in which "this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States*, 318 U. S. 332, 341. See also *Funk* v. *United States*, 290 U. S. 371; *Wolfle* v. *United States*, 291 U. S. 7, 13. Nor does any prior decision of this Court in which any sanction

has been given to the rule bar its rejection. This is a matter in which it is appropriate for the highest court of the land to point the lead by declaring a rule better adapted "to the successful development of the truth" than the inherited perjury rule. *Funk* v. *United States,* 290 U. S. 371, 381.

III

If the perjury rule is to be affirmed as law, we contend that it should be a rule for the court and not for the jury. It seems to us inconfestable that in this posture the rule would fulfill the protective function claimed for it and at the same time eliminate from federal criminal administration the unnecessary confusion of juries and the potentiality of injustice that mandatory instructions on a special quantum of proof would inevitably entail.

ARGUMENT

I

THE JURY MUST HAVE CREDITED AT LEAST TWO WITNESSES TO HAVE REACHED ITS VERDICT OF GUILTY. UNDER THE GOINS DECISION IT WAS THEREFORE NOT PREJUDICIAL ERROR TO REFUSE THE REQUESTED CHARGE

Assuming that the defendant in a perjury case is ordinarily entitled to have the jury instructed that the falsity of his oath must be proved by two witnesses or one witness and corroborating circumstances, we think that here, in accordance

with this Court's decision in *Goins* v. *United States*, 306 U. S. 622, the petitioner's conviction should be sustained on the ground that failure to give such instruction could not have been prejudicial.

In the *Goins* case the question at issue was the falsity of the defendant's testimony that he had not been in Chicago. The witnesses against him were one Millhorn, who testified that he had accompanied Goins and his wife to Chicago, and a hotel clerk, who testified that Goins had registered at a Chicago hotel. Both were corroborated by a hotel registration card bearing Goins' name. The Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Parker, held that the failure to give an instruction as to the quantum of evidence was not reversible error, since it was "inconceivable that the jury should have accepted the testimony of either of the witnesses and at the same time rejected the corroborative evidence." 99 F. (2d) 147, 149. This Court dismissed certiorari after hearing argument, "As it appears * * * that the District Court's failure to give Instruction B[2] could not have prejudiced the petitioner." 306 U. S. 622.

In the instant case, the issue which the jury determined under the judge's charge, *supra*, p. 7, was whether the petitioner was the real purchaser

[2] This requested instruction, on the quantum of evidence required, is set forth in the Government's brief in the *Goins* case, No. 516, October Term, 1938, at p. 2.

of the 170 tires sold by United States Petroleum Corporation or whether he was acting merely as an accommodation party. To paraphrase Judge Parker's statement in the *Goins* case, it is equally inconceivable here that the jury should have accepted the testimony of Sweeney or Roatche and at the same time rejected the corroborative evidence supplied by the notarized letter of March 24, 1942, in which the petitioner acknowledged purchasing the tires.

Both in his testimony at the first criminal trial and at the perjury trial, the petitioner's explanation of the apparent purchase shown by his letter of March 24, 1942, was that he was acting not for himself but to assist Sweeney and Roatche, to whom he referred, respectively, as "the first purchaser" and "the ultimate buyer" of the tires (R. 132a). Sweeney and Roatche each separately denied any such relationship to the transaction as that ascribed to him by the petitioner. Sweeney testified categorically that he had not bought the tires and had no personal arrangement with the petitioner in respect of the tires; that he had acted solely for his company in the sale of the tires. Roatche testified that he had not bought or received the tires himself and that the petitioner had not loaned him any money to purchase the tires.

Hence, the situation was not one where, to reach the verdict it did, the jury could have be-

lieved only *one* principal witness, as the dissenting judge thought (R. 204). If the jury believed that either Sweeney or Roatche had been a real beneficiary of the tire purchase, that would have made the petitioner's description of himself as a mere go-between credible. Therefore, it is only by believing the denials of personal interest of *both* of these witnesses that the jury could logically have concluded that the petitioner was the real buyer.

We do not deny that where the record would oblige an appellate court to speculate over whether the jury credited more than one witness, failure to give the requested instruction, if error at all, would constitute reversible error. Cf. *Bruno* v. *United States*, 308 U. S. 287. This is not such a case. Upon the record here there is room for speculation only as to how much the jury believed in excess of the minimum prescribed by the rule. It may be, for example, that the jury concluded that the "Bob Hastings" letter was signed by or under the direction of the petitioner. If so, it afforded additional corroboration. Such acceptance of it increases rather than diminishes the logical necessity of accepting the testimony of Sweeney and Roatche and the direct implications of the March 24 letter. Similarly, the jury may have been aided in deciding by the testimony of Gabel and Oates. But, as a matter of psychological possibility, it is even less

conceivable here than in the *Goins* case[*] that the jury credited a smaller aggregate of evidence than would be required by the most generous application of the rule. See also *Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9).

II

THE REQUIREMENT OF A SPECIAL QUANTUM OF EVIDENCE FOR CONVICTION OF PERJURY SHOULD BE REJECTED BY THIS COURT

When the *Goins* case was before this Court, the Government contended that the rule requiring a special quantum of evidence to convict of perjury should be re-examined and rejected. We renew the contention here. The evidential standards applicable to perjury cases should not, in our view, differ from those which obtain in prosecutions for other crimes.

(A) THE ORIGIN AND SCOPE OF THE RULE

The origin, history, and development of the perjury rule are comprehensively discussed by Dean Wigmore in his *Treatise on Evidence*, 3d ed., Vol. 7, Secs. 2040–2043. Until the abolition of the Court of Star Chamber in 1640, perjury of witnesses had as a matter of practice been prosecuted in that Court rather than in the King's

[*] As appears from the opinions in the Circuit Court of Appeals in the *Goins* case, (99 F. (2d) at 148, 149, 151, 152), one of the two witnesses there was a narcotic addict and a felon, and the authenticity of the hotel registration card was challenged.

Bench. The Star Chamber applied the canonical law, including the requirement of proof by at least two witnesses.[4] This circumstance may, as Wigmore suggests, explain the origin, following the transfer of Star Chamber jurisdiction, of a special requirement of proof in prosecutions for perjury at common law.[5] There was, however, a practical reason for distinguishing perjury from other crimes. At that time a defendant was generally disqualified to testify in his own behalf. But in perjury cases his statement under oath was, in effect, in evidence for him. In *Queen* v. *Muscot*, 10 Mod. 192 (1714), Parker, C. J., in charging the jury, attributed to this circumstance the following significance:

> There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness

[4] Wigmore, *Evidence*, Sec. 2032. See Appendix to Government's brief on reargument in *Cramer* v. *United States*, No. 13, October Term, 1944, pp. 40–41.

[5] Wigmore, op. cit., Sec. 2040. For a more detailed discussion of the treatment of perjury in England prior to 1640, see New York Law Rev. Comm., *Report, Recommendations and Studies* (1935), pp. 235–238.

> is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath.[6]

That the inadequacy of "oath against oath" became the ultimate rationale of the perjury rule in the common law courts is abundantly established both by the text writers and the early decisions. See *United States* v. *Wood*, 14 Pet. 430, 437–439. It is doubtful that two direct witnesses to the falsity of the oath were ever authoritatively required in the common law courts.[7] But the

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[6] In commenting on this case, Best, in his treatise on Evidence (3d Amer. ed.) Sec. 603, observes: "* * * there is nothing in Chief Justice Parker's charge inconsistent with the supposition that his observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with which he sets out, between the proof in perjury and that in civil cases." See also, Parker, J., in *Goins* v. *United States*, 99 F. (2d) 147, 150.

[7] In *R.* v. *Champney*, 2 Lew. Cr. C. 258 (1836), Colredge, J., stated that Lord Tenterden had maintained that two witnesses were necessary, although he himself merely held that one witness was not enough unless strongly corroborated. But as early as 1736, Lord Hardwick in *R.* v. *Nunez*, Lee Cases T. Hardwick, 265, stated: "One witness is not sufficient unless there were very strong circumstances." At about the time of *R.* v. *Nunez*, the chancery rule requiring two witnesses was being modified to provide for one witness and corroborating circumstances. *Walton* v. *Hobbs*, 2 Atk. 20 (1739). See Gest, *Responsive Answer in Equity*, 52 Am. L. Reg. 537, 560 (1904). It may be that two witnesses were necessary, however, in the sense that if corroboration were relied upon, the corroboration must be by an independent

principle that something more is necessary than the testimony of a single witness has persisted until modern times. Generally the product of judicial decision,[8] as in the federal courts, the rule has been crystallized by statute in England, Canada, and nine of the States.[9]

Despite general recognition that the rule persists, there is wide disagreement as to its meaning and scope. With respect to the degree of corroboration required, some courts have held that corroboration must be by evidence of weight equal to the direct testimony of a second witness,[10] while others have ruled that the defendant's own demeanor as a witness may alone provide sufficient corroboration.[11] Where, by the nature of the issue, direct testimony is impossible, it has been held, in qualification of the rule, that circumstantial evidence is enough. *People* v. *Doody*, 172

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witness. *State* v. *Hayward*, 1 Nott. Mc. (S. C.) 546, 548 (1819).

[8] A list of state decisions either declaring or assuming the rule appears in the decision of this Court in *Hammer* v. *United States*, 271 U. S. 620, 626–627.

[9] A list of the statutes codifying the rule appears in the Appendix, *infra*, p. 28.

[10] *Hall* v. *State*, 136 Fla. 644, 674 (1939); *State* v. *Hardiman*, 277 Mo. 229, 233 (1918); *Gandy* v. *State*, 23 Neb. 436, 450 (1888).

[11] *Boren* v. *United States*, 144 Fed. 801, 806 (C. C. A. 9); *People* v. *Todd*, 9 Cal. App. (2d) 237, 241 (1935); *State* v. *Miller*, 24 W. Va. 802 (1884).

N. Y. 165.[12] See also *O'Leary* v. *United States*, 158 Fed. 796 (C. C. A. 1); *State* v. *Cerfoglio*, 46 Nev. 332 (1922); *State* v. *Woolley*, 109 Vt. 53 (1937). So too the defendant's admission may itself suffice. *United States* v. *Buckner*, 118 F. (2d) 468 (C. C. A. 2). See also *Fraser* v. *United States*, No. 677 Present Term, pending on petition for certiorari to the Sixth Circuit. Moreover, this Court, more than a century ago established the even broader qualification that direct testimony is unnecessary where the falsity of the oath can be proved by documentary evidence. *United States* v. *Wood*, 14 Pet. 430. And the Supreme Court of Oregon has recently held that the perjury rule, codified by statute in that state, does not apply to the crime of false swearing, taking the position that the false swearing statute was designed to escape the burdensome conditions imposed by the perjury rule. *State* v. *King*, 165 Ore. 26 (1940).[13] We find in the decisions as a whole

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[12] This qualification has been approved in two of the federal courts. *Behrle* v. *United States*, 100 F. (2d) 714, 715 (App. D. C.); *United States* v. *Otto*, 54 F. (2d) 277, 279 (C. C. A. 2) (recognized but held not applicable to a situation where there could be a living witness). See also *Mallard* v. *State*, 19 Ga. App. 99 (1916); *State* v. *Wilhelm*, 114 Kan. 349, 352 (1923); *R.* v. *Natanson*, 3 D. L. R. 308 (1927).

[13] A somewhat similar attempt to escape the limitations of the perjury rule is reflected in *Kahn* v. *United States*, 214 Fed. 54, 56 (C. C. A. 2), in which the court said that the perjury rule has become inapplicable to modern conditions and did not apply to the crime of false swearing under Section

a growing difficulty with defense of the rule in terms of relevant policy.

In two states, rejection of the rule has been preferred to *ad hoc* qualification. The Supreme Court of Minnesota, in 1921, concluded that the rule is "out of harmony with our system of jurisprudence". *State* v. *Storey*, 148 Minn. 398. And in 1925, the Supreme Court of Delaware reached a like result. *Marvel* v. *State*, 33 Del. 110 (1925). In these states, proof beyond a reasonable doubt suffices for perjury as for other crimes.

(B) POLICY OF THE RULE

Criticism of the rule in its various versions has accumulated for more than a century. We agree with the courts of Minnesota and Delaware that the critics make an unanswerable case.

1. No argument is needed to show that there is no intrinsic objection to conviction of crime based upon "oath against oath." Whatever its weight before the defendant was a competent witness, it is clear today that the objection, if valid, must apply to any crime. We think the objection is invalid. Long ago Starkie observed, in describing

29 (b) of the Bankruptcy Act. See also *Schonfeld* v. *United States*, 277 Fed. 934 (C. C. A. 2). But in *United States* v. *Isaacson*, 59 F. (2d) 966, 968, the same circuit applies the perjury rule to a charge of false swearing under the naturalization statute, and in *Hammer* v. *United States*, 271 U. S. 620, 625–626, this Court, in a case involving subornation of perjury, held that false swearing in bankruptcy is perjury and that the perjury must be proved by more than one witness.

the perjury rule as "arbitrary and peremptory" that "it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the united testimony of many". Evidence, 2d Am. ed., [1828] v. 3, p. 1144. The point is sustained by daily experience in the courts.

2. Equally without substance is the suggestion, drawn from the old books (*e. g.*, Hawkins, *Pleas of the Crown*, Bk. 1, Ch. 69 (6th ed. 1777) p. 319) that perjury is a crime of so much greater enormity than others that more or stronger evidence should be required to convict. Cf. *State* v. *Courtright*, 66 Ohio 35, 41. It is enough to point to murder to establish that neither the premise nor the conclusion is sound.

3. A more plausible justification of the rule, given currency by Best (*Evidence*, Section 606), is that it encourages witnesses to testify by reducing the fear of unfounded perjury prosecutions. Other judicial requirements of corroboration, as in the case of confessions, are based—at least in substantial part—upon a doubt of the trustworthiness of the kind of evidence involved. We doubt that there are other situations where, as in the present case, a special requirement of corroboration must be justified solely in terms of policy wholly extrinsic to the validity of proof. Thus the theory advanced by Best and echoed in

many decisions introduces an anomaly in the general theory of proof.

Whether anomalous or not, the theory advanced is insubstantial on the merits. The policy of the law is not to encourage witnesses to testify but to encourage them to testify to the truth. The duty to testify is sanctioned as such by provision for compulsory process. But only the punishment for perjury provides a legal sanction for the duty to testify to the truth. It is difficult, therefore, to understand how the rule can be thought necessary to encourage testimony or how it can operate to encourage testimony of the truthfulness that the law seeks.

The issue has been posed in a different way by Dean Wigmore: "If there is a relatively greater likelihood of false accusation of perjury (on the part of defeated litigants seeking to revenge themselves), and if there is, relatively to the interests of litigants in general, less harm in the escape of a guilty perjurer than in that of other criminals, then the rule justifies its existence." Even in these terms, we think the answer is plain. To protect against false accusations of perjury, the law affords the arsenal of safeguards surrounding any prosecution for crime; in an age of public prosecution false accusations of perjury are inherently unlikely to cause harm. But general experience and such special studies

as have been made [14] suggest the conclusion that while perjury is frequent, the punishment of perjury is the exception rather than the rule. It should not be forgotten, moreover, that the sanction of perjury prosecution is itself an instrument for the protection of innocence—insofar as it operates to deter false testimony against defendants in criminal trials.

For the foregoing reasons, we submit that there is insufficient basis for the conclusion stated in *Hammer* v. *United States*, 271 U. S. 620, 627, that the perjury rule "is sound and has been found satisfactory in practice." The conditions which gave rise to the rule no longer exist and no cogent justification has been adduced for its retention in modern times.

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[14] *The Genesis of Perjury*, 25 Jour. Jur. 491 (1893); Safford, *The Present State of the Law of Perjury*, 2 Am. L. Rec. 321 (1873); Purrington, *The Frequency of Perjury*, 8 Col. Law Rev. 67 (1908); King, *Perjury in Illinois*, 17 Ill. L. Rev. 596 (1923); McCarthy, *Perjury in Judicial Proceedings*, 35 Amer. L. Rev. 684 (1901); *Perjury in Judicial Proceedings*, 64 U. S. L. R. 1 (1930); Hirschman, "*You Do Solemnly Swear!*" *or that Perjury Problem*, 24 J. of Cr. L. and Crim. 901 (1934); *The Problem of Successful Perjury*, 78 Sol. J. 423 (1934); McClintock, *What Happens to Perjurers*, 24 Minn. L. Rev. 727 (1940); New York Law Revision Commission, *Reports, Recommendations and Studies* (1935) pp. 285–292; and see speech of G. Lamb in Hans. Parl. Deb., 2nd series, v. 18 (1828) p. 867, quoted in Wigmore op. cit., Sec. 2041, fn. 1.

(C) AUTHORITY OF THIS COURT TO ABROGATE THE RULE

If, as we contend, the perjury rule is without substantial justification, the rule should be rejected by this Court in the exercise of its acknowledged function of determining "proper standards for the enforcement of the Federal criminal law in the Federal Courts". The issue is clearly within the realm in which "this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States*, 318 U. S. 332, 341. See also *Funk* v. *United States*, 290 U. S. 371; *Wolfle* v. *United States*, 291 U. S. 7, 13.

No controlling decision of this Court bars rejection of the rule. In *United States* v. *Wood*, 14 Pet. 430, the rule was recognized in the opinion but the decision qualified its scope. *Hammer* v. *United States*, 271 U. S. 620, affirmed the validity of the rule in general but the decision, if limited to the facts, involves only an incredible witness. *Goins* v. *United States*, 306 U. S. 622, held that failure to incorporate the rule in the charge was not prejudicial error. In *Warszower* v. *United States*, 312 U. S. 342, 347–8, the rule was not genuinely involved and the passing reference to it in the opinion is neutral in its effect. These are the only decisions of this Court which give any sanction to the rule. They do not suffice, in our view, to put it beyond the duty of the Court

to re-examine its foundations when an appropriate challenge is made.

It is true that the rule involved in the present case, though attenuated in various ways, has not, as in *Funk* v. *United States, supra,* been generally repudiated by statute or decision in the several states. But this is not, in our view, sufficient to sustain the rule if, as we contend, it cannot be justified on the merits. We read the decision in the *Funk* case to affirm as the basic measure of common law evidential rules "their adaptation to the successful development of the truth". 290 U. S. at 381. We read the opinion in the *Wolfle* case to mean that a common law rule must fall, however widely accepted, if it fails to meet the test of "reason and experience" (291 U. S. at 12) as applied by the federal courts. The standard must certainly contemplate that in matters peculiarly of judicial competence the highest court of the land may point the lead.

Unlike the rule in treason (Const. Art. III, §3), the perjury rule rests on neither constitutional nor statutory basis. It is the product of judicial decision and by judicial decision may properly be undone.

III

IF THE PERJURY RULE IS TO BE AFFIRMED AS LAW IT SHOULD BE VIEWED AS A RULE FOR THE COURT AND NOT FOR THE JURY

If the perjury rule is to be affirmed as law, we think its policy must necessarily be the protection

of witnesses against unjust accusation. We contend that this purpose is adequately served by the conception of the rule advanced by Judge Maris in the court below—as a rule for the court and not for the jury. Measured in these terms, the rule would preclude submission of the cause if the evidence of perjury were limited to the testimony of a single witness. Whatever its merit, this is a standard susceptible of rational application by the courts. But if the rule is viewed as a standard for the guidance of the jury, we see no escape from Judge Maris' conclusion that

> * * * the interjection of the rule into their deliberations would impede rather than aid them in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant. For if such an instruction is to mean anything it must mean that the members of the jury must make an independent decision as to the credibility of each government witness before they determine the guilt of the accused and, if they find themselves unable to credit the corroborating witness whom the Government has offered, they must acquit the defendant even though they may be so well satisfied of the credibility of the principal government witness as to be convinced beyond doubt of the defendant's guilt. Anyone who has had practical experience in the conduct of jury trials knows that the mem-

> bers of a jury who are thus convinced of the defendant's guilt cannot be expected to pay much attention to a rule such as this which, even if understood, is likely to be viewed by them as legalistic and technical. (R. 195–196.)

It seems to us incontestable that the protective function claimed for the rule does not warrant the distortion of the deliberative powers of the jury that mandatory instructions on a special quantum of proof would inevitably entail.

We submit moreover that the position taken by Judge Maris is the logical effect of the decision of this Court in the *Goins* case, as Judge Bard suggested in the court below. In the *Goins* case it was not logically impossible, however improbable in fact, for the jury to have concluded that the corroborating evidence was not itself entitled to weight at the same time that it credited the testimony of the principal witness. (See the dissenting opinion of Judge Soper, 99 F. (2d) at 142.) We think, therefore, that in concluding that the failure of the trial court to give the requested instruction "could not have prejudiced the petitioner" this Court necessarily held it unnecessary for the corroborating evidence to have such weight with the jury that it would be credited if it stood by itself. But if the rule requires no more than that the corroboration be credited when viewed along with the testimony of the principal witness, it has no substantial validity

as a rule for the jury. For, where the evidence, including the corroboration, has sufficient weight for the case to go to the jury at all, it is almost inevitable that a jury which credits the principal witness will also accept the corroborative evidence that points in the same way. It seems plain, therefore, that the rule can serve a substantial function, if at all, only as a rule for the court.

CONCLUSION

For the foregoing reasons, we contend that the judgment of conviction should be affirmed.

Respectfully submitted.

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JANUARY 1945.

APPENDIX

Statutory Codifications of the Perjury Rule

Arizona Code Anno. (1939), Sec. 44, 1812, 1813
(Penal Code (1901), Secs. 930, 931)[15]

California Penal Code (Deering, 1941), Sec. 1103 (a)
(Code of Civil Procedure (1872), Sec. 1968)

Colorado Stat. Anno. (1935), Ch. 48, Sec. 448
(General Laws (1877), p. 322)
(limited to indictments)

Georgia Code Anno. (1936), Title 38, Sec. 121
(Code of 1895), Sec. 991

Idaho Code Anno. (1932), Ch. 5, Secs. 16–501
(Code of Civil Procedure (1881), Sec. 933)

Montana Revised Codes (Choate, 1935), Sec. 10608
(Code of Civil Procedure (1877), Sec. 398)

Ohio Code Anno. (Baldwin, 1940), Secs. 13444–22
(Laws of Ohio (1929), p. 190)

Oregon Compiled Laws Anno. (1940), Sec. 2–902
(Code of Civil Procedure (1862), Ch. VIII, Title VIII, Sec. 768)

Texas Code of Criminal Procedure (Vernon, 1925), Title 8, Article 723
(Code of Criminal Procedure (1857), Art. 657)

England—St. 1911, 1 and 2, Geo. V. C. 6, Sec. 13

Canada—R. S. 1906, c. 146

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[15] The citations in parentheses show the date of original enactment.

U. S. GOVERNMENT PRINTING OFFICE 1945

SUPREME COURT OF THE UNITED STATES.

No. 340.—October Term, 1944.

Lee F. Weiler, Petitioner, *vs.* United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 29, 1945.]

Mr. Justice Black delivered the opinion of the Court.

This Court stated in *Hammer* v. *United States*, 271 U. S. 620, 626, that "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." The question here is whether it is reversible error to refuse to charge the jury to this effect.

The petitioner was convicted of perjury in a federal district court.[1] In a prior criminal proceeding for violation of Office of Price Administration regulations he had testified that he had neither bought nor had in his possession in March, 1942, certain automobile tires. He further testified that although he had signed a notarized letter in which he stated that he had purchased the tires, he was not in reality the purchaser, but had merely lent the money for their purchase, and had signed the letter as an accommodation. The jury acquitted him and he was then indicted for perjury. The indictment charged that his testimony with reference to the tire transaction was false. In the perjury trial the petitioner reiterated his former testimony as to the tire transaction. Several government witnesses gave testimony from which the jury could have found that petitioner was in fact the purchaser.

When the evidence was completed, petitioner requested the trial judge to give the following instruction to the jury:

"The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty."

[1] 18 U. S. C. 231, defines the federal offense of perjury.

This instruction was refused, and the trial judge, in his oral charge completely omitted any reference to the "two witness rule" in perjury cases. The petitioner was convicted, and the Circuit Court of Appeals affirmed on the ground that it was for the court to determine whether the quantitative rule of evidence in perjury had been satisfied, that it had been satisfied in this case, and that consequently, the District Court had properly refused the requested charge. 143 F. 2d 204. Other Circuits have held that similar charges should be given. *Pawley* v. *United States*, 47 F. 2d 1024, 1026, (C. C. A. 9); *Allen* v. *United States*, 194 F. 664, 668, (C. C. A. 4).

In granting certiorari, — U. S. —, we limited review solely to the question of whether the trial court erred in denying this charge.

First. The government asks that we reexamine and abandon the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness. The argument is that while this quantitative rule as particularly applied to perjury cases may have been suited to the needs of the 18th Century, it has long since outlived its usefulness, that it is an incongruity in our modern system of justice, and that it raises an unjustifiable barrier to convictions for perjury.

Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many.

The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries.[2] That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served

[2] Wigmore on Evidence (Third Edition) §§ 2030-2044.

by such consequence. Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony.[3] Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule. As we said in *Hammer* v. *United States*, *supra*, 626-627, "The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."[4]

Second. The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have

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[3] See also 8 Wigmore, *supra*, Sec. 2195g.

[4] After a careful study made by a joint Parliamentary Committee, looking to a codification of English criminal laws, it unanimously recommended and Parliament passed the following law:

"A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false." [redacted] Parliamentary Debates, Lords, Vol. VII, 1911, pp. 143-146; Reports from the Joint Select Committee of the House of Lords and the House of Commons on the Licensing (Consolidation) Bill and the Perjury Bill [H. L.], 1910, No. 321, p. 62. Cf. State v. Story, 148 Minn. 398; Marvel v. State, 32 Del. 110.

Perjury Act, 1911, 1 & 2 Geo. V, c. 6, sec. 13, Public General Acts, 1st & 2nd Geo. V, 1911;

been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury.[5] Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. Cf. *Bruno* v. *United States*, 308 U. S. 287. The refusal of the trial judge to instruct the jury as requested was error.

Third. It is argued that this error did not prejudice the defendant. We cannot say that it did not. The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere "technical" error relating to the "formalities and minutiae" of the trial. *Bruno* v. *United States*, *supra*, 293, 294. We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility. Nor are we compelled to conclude that this error was harmless because of our action in *Goins* v. *United States*, 306 U. S. 622, by which we left undisturbed a holding of the Circuit Court of Appeals that Goins, convicted for perjury, had not been prejudiced by the refusal of a charge on the two witness rule. *Goins* v. *United States*, 99 F. 2d 147. That case was decided on the basis of its own peculiar facts and cannot be extended to the facts of this one.

Reversed.

[5] See State v. Hill, 223 N. C. 711; Brown v. State, 101 Tex. Crim. 639, 644; Clower v. State, 151 Ark. 359; Madden v. State, 26 Okla. Crim. 251.